Editor's note: Reconsideration granted; decision modified -- See Samuel Lee Gifford (On Reconsideration), 55 IBLA 1 (May 21, 1981)

SAMUEL LEE GIFFORD ET AL.

IBLA 80-513 Decided February 26, 1981

Appeals from decisions of the Nevada State Office, Bureau of Land Management, rejecting Indian allotment applications N-26459 etc.

Affirmed as to 15 applications; affirmed in part, set aside and remanded in part as to 1 application.

1. Classification and Multiple Use Act of 1964 -- Indian Allotments on Public Domain: Lands Subject to -- Public Records -- Segregation

   Publication in the Federal Register of a classification for multiple use management pursuant to 43 CFR 2461.2 will segregate the affected lands to the extent indicated in the notice, and subsequent Indian allotment applications for such lands must be rejected.

2. Act of February 8, 1887 -- Indian Allotments on Public Domain: Lands Subject to

   Sec. 4 of the General Allotment Act of Feb. 8, 1887, as amended, 25 U.S.C. § 334 (1976), authorizes the Secretary of the Interior to issue allotments to Indians where the Indians have made settlement upon public lands "not otherwise appropriated." An application for an Indian allotment is properly rejected where the lands included in the application are not available for settlement and disposition under the General Allotment Act because they have been segregated from all forms of entry under the public land laws by the Act of Mar. 6, 1958.

3. Act of February 8, 1887 -- Indian Allotments on Public Domain: Lands Subject to -- Patents of Public Lands: Effect

   The effect of the issuance of a legal patent is to transfer legal title from the United States and to remove the land from the jurisdiction of the Department of the Interior.

   Where BLM records show lands have been patented, an Indian allotment application filed under the General Allotment Act of Feb. 8, 1887, for such lands is properly rejected.

4. Applications and Entries: Generally -- Indian Allotments on Public Domain: Generally

   Applications for Indian allotments on the public domain pursuant to sec. 4, General Allotment Act, as amended, 25 U.S.C. § 334 (1976), which are unaccompanied by the certificate of eligibility required by 43 CFR 2531.1, are properly rejected.

APPEARANCES: Each appellant named in the Appendix, pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

The persons listed in the Appendix hereto have appealed from decisions of the Nevada State Office, Bureau of Land Management (BLM), rejecting 16 applications filed for Indian allotments on public lands in Clark County, Nevada, pursuant to section 4, Act of February 8, 1887, as amended, 25 U.S.C. § 334 (1976). Because of the similarity of issues and the obvious relationship among the appellants, the Board, sua sponte, has consolidated the appeals for consideration.

The applications in question were filed with the Nevada State Office between January and November 1979. On each application form the applicants checked "no" in response to the question whether the land was occupied by the applicant or the minor child and whether there were improvements on the land. In response to the question "Do you or the minor child claim a valid bona fide settlement," 12 applicants checked "no" and 4 applicants checked "yes." Each application referred to a posted notice, a copy of which was attached to the application. All

notices, except the one in N-26369, showed that they had been recorded in Clark County and listed a receiving number and book of recordation. The attached documents were the same in each case except for written insertions naming the applicant, and each asserts rights based upon various statutes relating to Indians and to their citizenship rights. Each applicant asserted that he or she is of Indian descent from the Cherokee, Choctaw, Pawnee, Chickasaw, Pottawatomi, or Wyandotte tribes.

BLM rejected applications N-26459, N-26087, N-26350, N-26352, N-26454, N-26457, N-26780, N-27192, and N-27244, because the lands requested in said applications lie within an area that has been classified for retention in Federal ownership. BLM explained that the classification segregates the lands from appropriation under the agricultural land laws, including the Act of February 8, 1887.

BLM rejected application N-26312 for the following reason:

> The land requested in your Indian allotment application N-26312 lies within the Eldorado Valley which is affected by Public Law 85-339 and amendments thereto. The act, passed on March 6, 1958, reserves approximately 126,775 acres in Eldorado Valley for acquisition by the State of Nevada, Colorado River Resources Commission. Consequently, the land is not subject to entry under the agricultural land laws and the application is hereby rejected.

BLM rejected application N-25503 because the lands requested had been transferred from Federal ownership and were not subject to entry under the public land laws.

Finally, BLM rejected applications N-25375 and N-25378 because the applicants had failed to submit a certificate from the Commissioner of Indian Affairs showing that he or she was an Indian and entitled to an allotment as required by 43 CFR 2531.1(b). BLM held applications N-25377, N-25379, and N-26369 for rejection, and allowed these applicants 30 days from receipt of the decision to submit documentation of their eligibility, as required by 43 CFR 2531.1(d), when filing on behalf of a minor child. The case files contain no certificates of eligibility.

The statement of reasons in N-27244 contains the arguments presented in N-26087, N-26312, N-26350, N-26352, N-26454, N-26457, N-26459, N-26780, and N-27192. It reads as follows:

> Departmental Regulations, Classifications, Public Laws, Agricultural Land Laws, etc., does not mean

Appropriated as Federal Law states under Statutes 334- 336- 348- 349, etc. Therefore, they can not supersede the Allotment Claims of Indians.

See Title 25 U.S. Codes 334- 336- 348- etc.

See 43 C.F.R. 2212 [1/]

See Choates vs. Trapp, 224 U.S. 413 (1912) [2/]

See U.S.C.A. Const. Amend. 5

We interpret the above laws to say, any surveyed or unsurveyed land of the United States not otherwise appropriated (by Congress). We do not find Classifications, Regulations, Segregations etc., as being applicable.

The other applicants cite various statutes and treaties in their statements of reasons. The statement of reasons filed in N-26369 is typical:

This claim was not filed under the 4th Section of the Act of Feb. 8, 1887 only, but also under 43 U.S. Code 190 (Act of July 4, 1884 C 180 Sec. 1 Stat. 96) 43 U.S. Code (Act of March 3, 1875 C 131 and 15, 18 Stat. 420) Section 4 of the Act of Feb. 8, 1887 (24 Stat. L. 388) of June 25, 1910 (36 Stats. L. 855 Et. Seg. where applicable and in pari materia with my tribes' treaty commitments with the United States of America). Said rights being reserved to me under the Indian Citizenship Act because of my Indian Descent under the Act of June 2, 1924 (43 Stats. 253). See 8 U.S.C. 1401 25 U.S.C. - 332, 334, 345, 346, 190, 337, 43 U.S.C. 190, 189, etc. It seems most of them are being overlooked. They are all recorded on this claim.

See- Choats V. Trapp 224 U.S. 413 (1912)
See- U.S.C.A. Const. Amend. 5

The applicant in N-26312 added that P.L. 85-339, which segregated lands in the Eldorado Valley, cannot supersede the allotment claims of Indians.

We shall first consider the appeals from BLM's decisions rejecting applications because the requested lands lie within an area that has

1/ 43 CFR Subpart 2212 deals with miscellaneous state exchanges.
2/ We note that the Indian allotment case at 224 U.S. 413 is Heckman v. United States; Choate v. Trapp appears at 224 U.S. 665.

been classified for retention in Federal ownership. Item 10 of the application form, after asking the applicant to indicate whether there was a claim of bono fide settlement states: "(Public land withdrawn by Executive Orders 6910 and 6964 of November 26, 1934, and February 5, 1935, respectively, is not subject to settlement under section 4 of the General Allotment Act of February 8, 1887, as amended, until classified as suitable.)" 3/

There is no information or credible evidence to show that any of the applicants have, in fact, physically settled upon the lands applied for, and particularly, that any alleged settlement was initiated prior to the first general order of withdrawal, Exec. Order No. 6910, November 26, 1934, supra. It is well established that no rights of Indians are violated by the withdrawal of public lands from settlement and the requirement that such lands be classified pursuant to section 7, Taylor Grazing Act, 43 U.S.C. § 315f (1976), before the public lands can be allotted to an Indian under section 4 of the General Allotment Act, supra. Pallin v. United States, 496 F.2d 27 (9th Cir. 1974); Hopkins v. United States, 414 F.2d 464 (9th Cir. 1969); Finch v. United States, 387 F.2d 13 (10th Cir. 1967), cert. denied, 390 U.S. 1012 (1968). Nor is there a violation of any rights of the Indian if an allotment application is denied where the land is not classified for allotment. Finch v. United States, supra. Also, regulation 43 CFR 2530.0-3(c) provides that public land withdrawn by Exec. Order No. 6910, supra, and within a grazing district established under section 1 of the Taylor Grazing Act, 43 U.S.C. § 315 (1976), is not subject to settlement under section 4 of the General Allotment Act, supra, until such settlement has been authorized by classification. All public land in Clark County, Nevada, was placed in Nevada Grazing District No. 5,

3/ "First general order of withdrawal. Subject to the conditions expressed in the Act of June 25, 1910, (36 Stat. 847), as amended by the Act of August 24, 1912 (37 Stat. 497; 43 U.S.C. 141-143, 16 U.S.C. 471), it is ordered that all of the vacant, unreserved and unappropriated public land in the states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale, or entry and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of the Act of June 28, 1934 (48 Stat. 1269; 43 U.S.C. 315-315n, 1171), and for conservation and development of natural resources.

"The withdrawal hereby effected is subject to existing valid rights.

"This order shall continue in full force and effect unless and until revoked by the President or by act of Congress. [E.O. 6910, Nov. 26, 1934.]"

by Departmental order of November 3, 1936 (Federal Register, Vol. 1, p. 1748, Nov. 7, 1936). 4/

All lands described in the nine applications were classified for multiple use management, and the notice of classification was published in the Federal Register, Vol. 34, pages 14084-14085, September 5, 1969. The notice states:

Notice of Classification of Public Lands
for Multiple-Use Management

August 14, 1969

1. Pursuant to the Act of September 19, 1964 (43 U.S.C. 1411-18) and to the regulations in 43 CFR Parts 2410 and 2411, the public lands within the area described below are hereby classified for multiple-use management. Publication of this notice has the effect of segregating the described lands from appropriation only under the agricultural land laws (43 U.S.C. Pts. 7 and 9; 25 U.S.C. sec. 334) and from sales under section 2455 of the Revised Statutes (43 U.S.C. 1171) and the lands shall remain open to all other applicable forms of appropriation, including the mining and mineral leasing laws, with the exception contained in paragraph 3. As used herein, "public lands" means any lands withdrawn or reserved by Executive Order No. 6910 of November 26, 1934, as amended, or

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4/ "Order Establishing Grazing District No. 5 in the State of Nevada

November 3, 1936.

"Under and pursuant to the provisions of the Act of June 28, 1934, 48 Stat. 1269, as amended by the Act of June 26, 1936, Public, No. 827, 74th Congress, and subject to the limitations and conditions therein contained, Nevada Grazing District No. 5 is hereby established, the exterior boundaries of which shall include the following-described lands:

Nevada
Mount Diablo Meridian

"All of Clark County exclusive of Dixie National Forest and Fort Mohave and Moapa River Indian Reservations.

"Rules and regulations for the administration of grazing districts issued by the Secretary of the Interior March 21, 1936, shall be effective as to the lands embraced within this district from and after the date of the publication of this order in the Federal Register

W. C. Mendenhall,
Acting Secretary of the Interior."

> within a grazing district established pursuant to the Act of June 28, 1934 (48 Stat. 1269), as amended, which are not otherwise withdrawn or reserved for Federal use or purpose.

The description of the segregated lands includes the lands requested by appellants.

[1] Publication in the Federal Register of a notice of classification pursuant to the Classification and Multiple Use Act of 1964, 43 U.S.C. §§ 1411-1413 (1976), and the regulations in 43 CFR Subparts 2410 and 2411, will segregate the affected land to the extent indicated in the notice. Robert Dale Marston, 51 IBLA 115 (1980); United States v. Rodgers, 32 IBLA 77 (1977). Publication in the Federal Register of a notice of a classification under the Classification and Multiple Use Act will segregate the lands described from other forms of disposal unless the classification provides specifically that the lands shall remain open for certain forms of disposal. Robert Dale Marston, supra; H. E. Baldwin, 3 IBLA 71 (1971). The notice, published September 5, 1969, segregated the lands described from disposal under the agricultural land laws, including 25 U.S.C. § 334 (1976). The applicants do not show that they occupy the land or have placed improvements upon it. There is no evidence that any of the applicants have made "settlement" as required by the Act prior to the time the land was no longer available for entry.

BLM rejected application N-26312 because the lands requested lie within the Eldorado Valley, which was reserved by the Act of March 6, 1958, 72 Stat. 31, for acquisition by the State of Nevada, Colorado River Commission. This Act authorized and directed the Secretary to segregate, from all forms of entry under the public land laws during a period of 5 years from and after the effective date of the Act, 126,775 acres of land in the State of Nevada including the lands sought by appellant, NE 1/4 sec. 25, T. 25 S., R. 62 E., Mount Diablo meridian. The Colorado River Commission was allowed to select lands from those segregated. The period of time for selecting the lands was extended to 10 years by the Act of October 10, 1962, 76 Stat. 804.

Section 3 of the Act of March 6, 1958, as amended, provides:

> Sec. 3 The Commission, acting on behalf of the State, is hereby given the option, after compliance with all of the provisions of this Act and any regulations promulgated hereunder, of having patented to the State by the Secretary all or portions of the lands within the transfer area. Such option may be exercised at any time during the ten-year period of segregation established in section 2, but the filing of any application for the conveyance of

> title to any lands within the transfer area, if received by the Secretary from the Commission prior to the expiration of such period, shall have the effect of extending the period of segregation of such lands from all forms of entry under the public land laws until such application is finally disposed of by the Secretary. [Emphasis added.]

The BLM records show that the entire township was segregated from entry by Public Land Order (PLO) No. 339 of April 7, 1958, until March 7, 1963. On October 10, 1963, PLO 3246 extended the segregation effect to March 6, 1968. In an application to the Secretary of the Interior dated March 1, 1968, the Colorado River Commission requested the transfer and conveyance of certain lands including the lands in issue. The filing of this application segregated these lands in accordance with section 3 of the Act of March 6, 1958. The lands remain segregated because apparently there has been no final disposition of the application.

[2] Section 4 of the Act of February 8, 1887, supra, authorized the Secretary of the Interior to issue allotments to Indians, in certain instances, where the Indians have made settlement upon public lands "not otherwise appropriated." Thurman Banks, 22 IBLA 205 (1975). In the present case, the lands were "appropriated" when they were segregated under the Act of March 6, 1958, supra. Furthermore, appellant has not made "settlement" as required by the Act. His application shows that he had neither occupied the land nor placed improvements on it.

Appellant's application (N-26312) was filed on September 28, 1979 (at which time no settlement had been initiated), years after the segregation of the land in issue. An application for an Indian allotment is properly rejected when the lands included in the application are not available for settlement and disposition under the General Allotment Act at the time the application is filed. Thurman Banks, supra.

The authority cited by appellant is not in point because the instant case involves land which was segregated from all forms of entry under the public land laws at the time appellant's application was filed.

BLM rejected application N-25503 because the lands requested have been transferred from Federal ownership and are not subject to entry under the public land laws. The applicant requested the lands in the SW 1/4 sec. 29, T. 20 S., R. 59 E. The case file contains a copy of patent No. 1133536 issued to the Husite Company for various lands including the S 1/2 SW 1/4 and the NE 1/4 SW 1/4, T. 20 S., R. 59 E. There is no evidence which shows that the NW 1/4 SW 1/4 was patented.

[3] In a case in which Federal officers have acted within the scope of their authority, a patent for land, once issued, passes beyond

the control of the Executive Branch of the Government. United States v. State of Washington, 233 F.2d 811 (9th Cir. 1956). The effect of the issuance of a land patent is to transfer the legal title from the United States. Robert Dale Marston, supra; Federal American Partners, 37 IBLA 330 (1978); State of Alaska, 35 IBLA 140 (1978); Basille Johnson, 21 IBLA 54 (1975). Appellant has not asserted that the patent involved was improperly issued. The Department has held where BLM's records show lands have been patented, the United States does not have title to them, and an Indian allotment application for such lands is properly rejected. Maudra June Underwood Lentell, 49 IBLA 317 (1980); Anquita L. Kluenter, A-30483 (Nov. 18, 1965).

As for the lands in the NW 1/4 SW 1/4, the case (N-25503) is remanded to BLM for consideration of whether those lands are available.

We shall deal next with the appeals from BLM's decisions rejecting or holding for rejection the applications for which no certificate of eligibility had been filed. In N-25377, N-25379 and N-26369, BLM allowed appellants 30 days from receipt of the decision to submit the required documents. Since the documents were not filed within the time required, these applications were held to be rejected.

[4] Regulation 43 CFR 2531.1, promulgated pursuant to the Allotment Act, defines the qualifications of applicants:

> § 2531.1 Qualifications of applicants.
>
> (a) General. An applicant for allotment under the fourth section of the act of February 8, 1887, as amended, is required to show that he is a recognized member of an Indian tribe or is entitled to be so recognized. Such qualifications may be shown by the laws and usages of the tribe. The mere fact, however, that an Indian is a descendant of one whose name was at one time borne upon the rolls and who was recognized as a member of the tribe does not of itself make such Indian a member of the tribe. The possession of Indian blood, not accompanied by tribal affiliation or relationship, does not entitle a person to an allotment on the public domain. Tribal membership, even though once existing and recognized, may be abandoned in respect to the benefits of the fourth section.

None of these appellants submitted the required certificate. Instead, in the application blank space specifically requesting the number of the certificate issued by the Bureau of Indian Affairs appellants each entered "8 U.S.C. § 1401, Const. Amend. 5." This response does not comport with the requirements. Neither the cited statute, which refers to United States citizenship, nor the United

States Constitution, is in issue here. BLM properly rejected these applications because the applicants failed to comply with the regulations.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions in all cases except N-25503 are affirmed. The decision in N-25503 is affirmed in part and set aside and remanded in part to BLM for further consideration consistent with this opinion.

Anne Poindexter Lewis
Administrative Judge Lewis

We concur:

Bernard V. Parrette
Chief Administrative Judge

Bruce R. Harris
Administrative Judge

APPENDIX

IBLA 80-513 N-25375 Ronald Neal Lentell SW 1/4 sec. 24,
T. 21 S., R. 62 E.

N-25377 Ronald Neal Lentell for
Michael Wayne Lentell, SE 1/4 sec. 24,
a minor child T. 21 S., R. 62 E.

N-25378 Rodney Neil Lentell NW 1/4 sec. 24,
T. 21 S., R 62 E.

N-25379 Rodney Neil Lentell for
Christina Marie NE 1/4 sec. 24,
Lentell, a minor child T. 21 S., R. 62 E.

N-25503 Jerry Wayne Gibson for
Jerry Wayne Gibson, Jr., SW 1/4 sec. 29,
a minor child T. 20 S., R. 59 E.

N-26350 Andrew Jackson Fryrear NW 1/4 sec. 24,
T. 20 S., R. 64 E.

N-26352 David Andrew Bevill NE 1/4 sec. 24,
T. 20 S., R. 64 E.

N-26369 Bill G. Perry for Kristy
Gamble Perry, a minor SW 1/4 sec. 28,
child T. 18 S., R. 59 E.

N-26454 Everly C. Stallings SE 1/4 sec. 30,
Haynes T. 23 S., R. 59 E.

N-26457 Linda Louise Hayes SW 1/4 sec. 23,
Gifford T. 23 S., R. 59 E.

N-26459 Samuel Lee Gifford NW 1/4 sec. 23,
T. 23 S., R. 59 E.

N-26780 Billy Ray Morgan SW 1/4 sec. 22,
T. 20 S., R. 64 E.

N-27192 Jimmie L. Puckett Meeks NW 1/4 sec. 33,
T. 19 S., R. 64 E.

N-27244 Eugene McCartney for
Nicole Michelle SW 1/4 sec. 34.
McCartney, a minor T. 19 S., R. 64 E.
child